Nos. 87-253, 87-431, 87-462, and 87-77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health and Human Services,
Appellant,

—v.—

CHAN KENDRICK, et al.,
Appellees.

OTIS R. BOWEN, Secretary of Health and Human Services,
Appellant,

—v.—

CHAN KENDRICK, et al.,
Appellees.

CHAN KENDRICK, et al.,
Cross-Appellants,

—v.—

OTIS R. BOWEN, Secretary of Health and Human Services,
Cross-Appellee.

UNITED FAMILIES OF AMERICA,
Appellant,

—v.—

CHAN KENDRICK, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CROSS-APPELLANTS' REPLY BRIEF

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I. THE SEVERABILITY ISSUE IS PROPERLY BEFORE THIS COURT

The undisputed facts presented in appellees' main brief make plain that the excision of the references to religious organizations in the AFLA would fundamentally alter the remaining provisions of the statute and the experimental purpose of this demonstration Act. Furthermore, the undisputed record reveals that the mandate for religious involvement and the promotion of religious beliefs permeates the entire administration and operation of the Act, indicating that HHS itself viewed the role of religious organizations as central to the legislation, consistent with the clear legislative intent. And finally, the facts revealed that the HHS Notice of Grant Award condition prohibiting the "promotion of religion" did not in fact provide any assurance that federal taxpayer dollars would not be used to advance religion, and therefore only a new "AFLA," which only *Congress* has the power to rewrite, could ensure the constitutionality of the Act.

Faced with the overwhelming and uncontroverted record, appellants respond by suggesting that it is premature for this Court to reach the severability issue.[1] They argue that "proper resolution of this case awaits evaluation of a complex factual record," Gov. Reply Br. 2, and that a remand is necessary before this Court can review the district court's orders, including its order on severability. As appellees will demonstrate, these claims are without merit.

Although the government seems to go back and forth on whether the extensive facts presented by appellees about the

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1 Appellees have standing to challenge the district court's severability decision as well as the statute itself. The government attempts to challenge standing in two footnotes, Gov. Br. 31 n. 24, Gov. Reply Br. 2 n.2, despite the district court's ruling, J.S. App. 8a-12a, and this Court's ruling in *Flast v. Cohen*, 392 U.S. 83 (1968), left unchanged as to Establishment Clause cases by *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). Their claim that *Valley Forge* precludes appellees' as applied challenge is clearly wrong in light of *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar* this Court upheld an as applied challenge under the Establishment Clause to Title I, 92 Stat. 2153, *as administered* by New York State. *Id.* at 407.

original AFLA grantees are even relevant,[2] the government now demands complete fact-finding on all grantees past and present.[3] The government claims that such determinations are necessary to establish whether there is a sufficient but unspecified quantity of "pervasively sectarian" grantees or "specifically religious activiti[es]," to justify the district court's conclusion that references to religious organizations must be severed and a prohibition of funding religious grantees written in. Gov. Reply Br. 8, 13. Appellants also claim that it would not be appropriate for this Court to make the additional factual determinations appellants view as necessary. *Id.* at 3, 11; Int. Reply Br. 4.

Although they filed cross-motions for summary judgment, appellants now further argue that summary judgment was not appropriate. *See* Gov. Reply Br. 5. However, under the well-

2 *See* Gov. Br. 33 n.26: "Unfortunately, the present record does not now permit such an individualized analysis, because all but one of the religiously affiliated groups analyzed by the district court are no longer receiving federal funds." The government's memorandum of points and authorities on summary judgment stated: "Moreover to the extent that plaintiffs rely on past administration of the Act or to grantee activities no longer occurring, such issues are irrelevant to the current administration." R. 181, Br. 3 n.1. In contrast, the government's reply brief discusses the need for an evaluation of "a complex factual record," apparently referring to the evidence on the 1981 and 1982 grantees presented in the district court. Gov. Reply Br. 2.

3 Unlike any other Establishment Clause case before this Court, this case involves grantees in over 40 states; this would require multiple depositions for each grantee and sub-grantee in forty different states from Pennsylvania to Alaska. Since HHS had little or no information or evidence about most of its grantees, appellees were forced to engage in an extensive discovery effort. *See* R.130, 3-8; R.126, 9-15; R.127; J.A. 745 (OAPP "does not require grantees to report the information about subgrant and subcontract arrangements"). Appellees' facts were based on four sets of interrogatories, three requests for production of documents and twenty-seven depositions of AFLA grantees and HHS officials. Since grantees were not parties to this suit, testimony had to be obtained by deposition subpoenas issued by federal district courts in the states where the non-party witnesses lived, and appellees even had to file a collateral appeal to the Fifth Circuit in order to obtain discovery material on one grantee. *Kendrick v. Heckler*, 778 F.2d 253 (5th Cir. 1985). The government's argument about the necessary fact-finding, if accepted, would set a precedent that would make the cost of Establishment Clause litigation prohibitive.

established legal standards governing summary judgment, the district court properly rested its constitutional determination on a record in which all material facts were undisputed. Furthermore, this Court has both the authority and the obligation to review the record and affirm that determination.

Rule 52(a) of the Federal Rules of Civil Procedure expressly makes factual findings unnecessary on summary judgment: "Findings of fact . . . are unnecessary on decisions of motions under Rules 12 and 56 or any other motion except as provided in Rule 41(b)." This is because only questions of law are presented on motions for summary judgment. *See, e.g., Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1261 (11th Cir. 1983); *International Ass'n. of Machinists v. Texas Steel Corp.*, 538 F.2d 1116, 1119 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977). In considering cross-motions for summary judgment in this case, the district court carried out its duty to determine whether there existed any genuine issue as to any material fact. Fed. R. Civ. P. 56. J.S. App. 7a-8a. The court's proper role, contrary to appellants' novel suggestions, *e.g.*, Gov. Reply Br. 2, 5, 11; Int. Reply Br. 3, 4, 6, is to review the record for any *genuine* factual disputes between the parties, *not* to resolve any existing disputes by making factual findings. *Anderson v. Liberty Lobby, Inc.*, 91 L. Ed. 2d 202, 212 (1986). As this Court stated, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . [when] he is ruling on a motion for summary judgment . . . ." *Anderson*, 91 L. Ed. 2d at 216.

Although not required to do so, *see* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.02[11] (2d ed. 1987), the district court in this case described the reasons why it concluded that there was no genuine factual issue in dispute:

> It is evident from the extent of the record in this case and from the motions themselves that the parties have had more than ample opportunity to submit all material pertinent to a motion for summary judgment. . . . After carefully and exhaustively considering the motions, the statements of material facts not in dispute, the allegations of disputed facts, the golconda of documents submitted to

> the Court, and the case law, the Court finds that the material facts are not in dispute and that summary judgment is appropriate.

J.S. App. 7a-8a. The court went on to set forth examples of facts that it found to be undisputed about no less than eighteen participants in AFLA programs. *Id.* at 33a-38a.[4]

By stressing the need for new findings of fact, appellants may be arguing that summary judgment is inappropriate because material facts are disputed.[5] Yet the government itself stated in its motion for summary judgment that "[t]he parties are in agreement on certain basic facts, such as the fact that grants were made to religiously-affiliated institutions. . . . Where basic facts are undisputed and only ultimate facts are at issue, summary judgment is appropriate." R.181, Br. 3 n.1.[6] The government claimed to dispute a relatively small number of the facts, but, as the district court explicitly found, the government did not properly controvert most of those facts in accordance

4 Several appellate courts have reversed district courts that offered absolutely no indication of their basis for granting summary judgment. *See, e.g., Myers v. Gulf Oil Corp.*, 731 F.2d 281 (5th Cir. 1984) (sixty-five word order gave no basis for decision). Significantly, appellants' complaint is *not* that the district court inadequately explained its reasons for granting summary judgment; rather, they object that the court did not make detailed findings of fact, which is not required on summary judgment.

At least one court has stated that "it would be ill advised" for a district court to make specific findings on summary judgment because "[t]hey would carry an unwarranted implication that a fact question was presented." *A.R., Inc. v. Electro-Voice, Inc.*, 311 F.2d 508, 513 (7th Cir. 1962).

5 The intervenor argues in its reply brief that the facts cited in appellees' brief are "wholly immaterial." Int. Reply Br. 14. Appellees' facts might very well be immaterial if the intervenor's theory of the First Amendment were the law, which it clearly is not. The intervenor argues that severability would be inappropriate here because Congress would be constitutionally *required* to include religious organizations among those it funded to teach and counsel adolescents on issues of sexuality as long as Congress chose to fund any organizations to provide instruction or advice on this issue. Int. Reply Br. 16-18.

6 Similarly, the intervenor did not dispute appellants' facts submitted in the district court, but only challenged their legal significance under the Establishment Clause analysis. R. 162, Br. 6-9.

with Rule 56(e). J.S. App. 32a n.14.[7] Of the 1251 facts submitted by appellees, the government properly disputed only 36, leaving undisputed 97.8% of appellees' facts. J.A. 619; *see* J.S. App. 32a n.14.[8] Appellants may not dispute before this Court any fact that they failed to show was disputed in the district court.[9] *See, e.g., Franz Chem. Corp. v. Philadelphia Quartz Co.*, 594 F.2d 146, 150 (5th Cir. 1979) ("It is almost axiomatic that any genuine issue of fact must somehow be shown to exist at the district court level."). Even at this late date, appellants do not "dispute" any of the facts that were uncontroverted and presented to the district court.[10]

7 Rule 56(e) of the Federal Rules of Civil Procedure clearly states, and this Court recently reaffirmed, that "a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleadings, but . . . *must set forth specific facts* showing that there is a genuine issue for trial.' " *Anderson*, 91 L. Ed. 2d at 212 (emphasis added).

8 Appellees' facts were presented in a three-volume four-hundred page statement of undisputed material facts cross-indexed to a seven-volume 3,702-page appendix. This evidence consisted primarily of documentary evidence and depositions. Because a large portion of the depositions were of grantee witnesses over 100 miles from the courthouse, the court on remand would be confronted with the same evidence on the basis of which it already found no material dispute. Fed. R. Civ. P. 45(d)(2).

9 "[F]or an appellate court to permit appellant to assert on appeal a fact issue not raised in the trial court is destructive of orderly procedure and undermines the utility of Rule 56." Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 493 (1984); *see also Founding Church of Scientology v. Smith*, 721 F.2d 828, 831 (D.C. Cir. 1983) ("Plaintiff has not contested this finding on appeal, nor indeed did it dispute the . . . evidence of sensitivity during the summary judgment proceedings in District Court."); *Sound Ship Building Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 101 n.3 (3rd Cir.) ("The presence or absence of genuine issues of material fact is to be gauged as of the time judgment was entered by the district court."), *cert. denied*, 429 U.S. 860 (1976).

10 Referring to the record readily establishes that not a single example in the government's reply brief constitutes an actual dispute. *See* Gov. Reply Br. 3, 4 n.5. For example, our reference to CHCHC's "Family Sunday" was hardly "baseless." *Id.* at 4 n.4. On the contrary, affiant Little admitted it was part of their application, but stated it "has not occurred." R. 181, Little Decl. ¶ 13. Instead, it was replaced by a "Day of the Family" which always

Moreover, appellees produced undisputed evidence of actual advancement of religion to a greater degree than any other Establishment Clause case reviewed by this court.[11] Even if the government had disputed 80% of plaintiffs' facts instead of 3%, the government still would had to have shown that the resolution of facts in their favor would have changed the outcome

occurs on a Sunday. Contrary to the government's assertion, Little admits that AFLA funds *were* used to promote the event. *Id.* at ¶ 14. And ministers were not merely "asked to mention the event," Gov. Reply Br. 4 n.4, but rather "announce[d] the Day of the Family program at their Sunday services" and "delivered a message on the importance of the family." R. 181, Little Decl. ¶ 13. The government also attempts to create factual disputes by mischaracterizing appellees' position. Thus, the government alleges a dispute over whether medical care at St. Margaret's was "inappropriate." Gov. Reply Br. 4 n.5. Yet our affiants' allegations were hardly so vague. Rather, Dr. Laz precisely stated that care at St. Margaret's is dictated by religious directives, which prohibit doctors from "performing, prescribing, recommending or even referring for sterilization, abortion or contraception." J.A. 527. The government's affiant disputes neither claim, and in fact concedes that care is given "within the guidance of the religious directives." J.A. 678. Finally, the government alleges factual disputes where plainly none exist. We allege, for example, that Lyon County held several classes at churches and parochial schools. The government counters by citing to over 80 pages of documents—none of which dispute our claim. Gov. Reply Br. 4. As in the district court, the government's "disputes" are "unsupported disagreements," or "reference[s] to the page in the multi-volume record at which the Court [can] look up an undescribed disagreement and decide for itself whether the effort [is] worthwhile." J.S. App. 32a n.14.

11 This Court has invalidated statutes under the "effects" test nine times since 1971 and in none of these cases, even where the statute had been implemented, were any findings made that the federal or state money had actually been directly used to teach religion, faith or morals or advance the particular religious mission of a religious grantee. *See Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Larkin v. Grendel's Den Inc.*, 459 U.S. 116 (1982); *Wolman v. Walter*, 433 U.S. 229, 248, 254 (1977) (section on loans of instructional materials and section on field trips); *Meek v. Pittenger*, 421 U.S. 349, 365 (1975) (invalidating section on instructional materials); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (one section invalidated); *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974).

of the case. Because of the cumulative nature of appellees' facts, the government could not have met this burden.

Appellees are not, as the government claims, proposing our "own findings of fact . . . and ask[ing] this Court to ratify those findings as if they had issued from the district court." Gov. Reply Br. 11; *see also* Int. Reply Br. 4. Rather, in order to assist this Court, we described some of the numerous *undisputed* facts that were established in the district court and are contained in the record. An appellate court reviewing a grant of a summary judgment motion applies the same standard as that applied by the trial court: "*[T]he reviewing court should evaluate the record* on an appeal from a summary judgment" in order to determine "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716, at 643 (1983) (quoting Fed. R. Civ. P. 56(c)) (emphasis added); *see also Anderson*, 91 L. Ed. 2d at 211-12 (applying this standard).[12] Thus, the district court's orders, both on summary judgment and severability, are properly before this Court, and remand is not appropriate.

II. THE DISTRICT COURT ACTED IMPROPERLY IN REWRITING THE AFLA

In keeping with cardinal principles of separation of powers, the judiciary is charged with enforcing the Constitution to its limits and the legislature with writing laws that conform to those limits. The district court properly found that the AFLA does not conform to the requirements of the Establishment Clause. Attempting, however, to "refrain from invalidating more of the [AFLA] than is necessary," the district court severed out the AFLA's references to religious organizations. Cr.

12 Where a trial court has chosen to make determinations as to which facts are undisputed, such findings are not protected by the "clearly erroneous" rule on appellate review. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2575, at 693 (1971). "The district court's order granting a summary judgment motion is not a discretionary decision and thus will be independently reviewed by the appellate court." *Wong v. Bailey*, 752 F.2d 619, 621 (11th Cir. 1985) (citing *Federal Deposit Ins. Corp. v. Dye*, 642 F.2d 837, 841 (5th Cir. Unit B 1981)).

J.S. App. 3a.[13] Recognizing, however, that mere severance was not enough to ensure constitutionality, the court rewrote[14] the statute by prohibiting funding to "religious organizations" as defined in the court's opinion, federal statutes and regulations, and by the government itself. Cr. J.S. App. 6a-7a.[15] The AFLA's language, its legislative history, and the "undisputed record" of six years of unconstitutional government sponsorship of religion establish beyond a doubt that rewriting the AFLA in this way was contrary to legislative intent. Congress, and not the courts, has the power to write a new statute, if it so desires, to replace the AFLA. "[I]t is for Congress to determine the proper manner of restructuring the [invalidated statute] . . . in the way that will best effectuate the legislative purpose." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 n.40 (1982).[16]

This Court has long held that courts may not rewrite legislation by inserting statutory limitations in order to cure statutory defects. As explained in *Hill v. Wallace*, 259 U.S. 44 (1922), a statute is nonseverable if it requires "inserting limitations it does not contain. This is legislative work beyond the power and

13 Citations to the district court's order will be to the Appendix of Appellees' Jurisdictional Statement in the form "Cr. J.S. App."

14 The intervenor states at three separate points in two pages of its reply brief that the district court rewrote the AFLA by severing the Act. Int. Reply Br. 16-17. Given this, we do not understand, nor does the intervenor explain, why its opposition to severability is limited to constitutional grounds. *Id.*

15 Only by willful misinterpretation can the intervenor suggest that the injunction applies to organizations "*solely* on the basis of religious belief or affiliation." Int. Reply Br. 1 (emphasis added). The court's ruling on the Rule 59(e) motion makes clear that to be disqualified, organizations must have a religious character that would create the risk of an establishment clause violation as defined in the district court's opinion and the Supreme Court opinions cited therein.

16 *See also Califano v. Westcott*, 443 U.S. 76, 94-95 (Powell, J., concurring in part and dissenting in part) ("[The Court] should not use its remedial powers to circumvent the intent of the legislature. . . . Rather than . . . rewriting [the statute], we should leave this task to Congress."), *aff'd on rehearing*, 443 U.S. 901 (1979).

function of the court." *Id.* at 70, *cited in Alaska Airlines, Inc. v. Brock*, 94 L. Ed. 2d 661, 669 (1987). The Court concluded that this "would be to make a new law, not to enforce an old one. This is no part of our duty." 259 U.S. at 71 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)). "[C]ourts addressing questions of severability should be guided by Chief Justice Taft's admonition 'that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitations.' " *Regan v. Time, Inc.*, 468 U.S. 641, 664 n.2 (1984) (Brennan, J., concurring in part and dissenting in part) (quoting *Yu Cong Eng. v. Trinidad*, 271 U.S. 500, 518 (1926)).[17]

III. REWRITING THE AFLA WOULD BE CONTRARY TO CONGRESSIONAL INTENT

This Court in *Alaska Airlines* described the "relevant inquiry in evaluating severability" as "whether the statute will function in a *manner* consistent with the intent of Congress." 94 L. Ed. 2d at 670 (emphasis in original).[18] The resulting statute must be "legislation that Congress would . . . have enacted." *Id.* If it is unclear whether Congress would have enacted a statute absent the severed provisions, "then the statute must fall." *El Paso Northeastern Ry. v. Gutierrez*, 215 U.S. 87, 97 (1909); *accord Butts v. Merchants & Marine Transp. Co.*, 230 U.S. 126, 137 (1913). This Court has also stated that when the unconstitutional and constitutional portions of a statute "are necessary parts of one system . . . the whole Act will fall *with the invalidity of one clause*. When there is no such connection and depen-

17 *See also Universal Amusement Co. v. Vance*, 587 F.2d 159, 172 (5th Cir. 1978) ("[W]e cannot judicially rewrite the Texas statutes and rules to incorporate the [constitutionally required] safeguards."); *United States v. McElroy*, 259 F.2d 927 (D.C. Cir. 1958) (citing "numerous instances in which the Supreme Court has held that such judicial reframing of legislation should not be attempted"), *aff'd*, 361 U.S. 281 (1960).

18 *See also City of New Haven v. United States*, 809 F.2d 900, 906 (D.C. Cir. 1987) ("[T]he ultimate inquiry in a severability case is not whether the statute may somehow continue to function after excision of the invalid portion, but rather whether it continues to function *in a manner consistent with Congressional intent*.") (emphasis in original).

dency the Act will stand . . . ." *Huntington v. Worthen*, 120 U.S. 97, 102 (1887) (emphasis added).[19]

"Absent a clearly expressed legislative intention to the contrary, the language of a statute must ordinarily be regarded as conclusive." Gov. Reply Br. 14 (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The language of the AFLA leaves no doubt that Congress would *not* have enacted the AFLA absent the inclusion of religious organizations and that a severed AFLA would *not* operate in a manner consistent with Congressional intent. Congress discussed "religious organizations" at four separate points throughout the AFLA—twice in the congressional "findings and purposes" describing why Congress enacted the AFLA and twice in operational sections of the statute making religious organizations eligible for direct funding and requiring all grantees to include religious organizations in their funded programs. *See* Appellees' Br. 2-4. The placement and content of the four provisions at issue establish extensive "connection and dependency," *Huntington*, 120 U.S. at 102, between the references to religious organizations and the remainder of the statute, thus rendering the AFLA nonseverable.

The government's suggestion that the references to religious organizations in the congressional findings are not relevant to the severability determination, Gov. Reply Br. 15, is incredible given that Congressional intent controls whether a statute is severable. As the government itself states, the function of the congressional findings is to "identify the concerns that persuaded Congress to enact the legislation." *Id.*[20] The congressional "findings and purposes" described in the AFLA demonstrate that Congress' intent in replacing Title VI with the AFLA was to utilize religious organizations to promote their values. The AFLA findings indicate Congress' conclusion that "the problems of adolescent premarital sexual relations, pregnancy, and parenthood . . . are *best approached*" through services provided by religious organizations. 42 U.S.C. § 300z(a)(8)(A) to (B). Congress further found that AFLA services should "emphasize" support provided to adolescents by religious organizations. 42 U.S.C. § 300z(a)(10)(C).

Two additional provisions expressly provide for the involvement of religious organizations in AFLA programs. Section 300z-2(a) directs that "[d]emonstration projects *shall* use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, *religious* and charitable organizations, and voluntary associations." (Emphasis added). Section 300z-5(a)(21)(B) directs that every application for an AFLA grant "*shall* include" "a description of how the applicant will, as appropriate in the provision of services . . . involve *religious* and charitable organizations, voluntary associations, and other groups . . . ." (Emphasis added).

These provisions require every AFLA grantee to involve religious groups in its program, as is clear from the use of the word "shall" in each provision. *See, e.g., Manatu County v. Train*, 583 F.2d 179, 182 (5th Cir. 1978) ("Use of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made.") (quoting *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977)). Although the provisions list several types of organizations in addition to religious groups, the organizations included are separated by the word "and," rather than "or," making the provisions mandatory as to all of the organizations listed. *E.g.*, New Hampshire Auto. Dealers Ass'n v. General Motors Corp., 620 F. Supp. 1150, 1157 (D.N.H. 1985) ("Where the conjunctive term 'and' is used in a statute . . . all of the requirements of the statute must be fulfilled."), *modified on other grounds*, 801 F.2d 528 (1st Cir. 1986).

The "as appropriate" in section 300z-5(a)(21)(B) refers to the way in which religious groups are included and not to whether

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19 *Accord Hill v. Wallace*, 259 U.S. 44, 70-72 (1922) (refusing to sever unconstitutional portions of a statute *despite* existence of a severability clause because invalid provisions were so interwoven with remaining Act); *Field v. Clark*, 143 U.S. 649, 695-96 (1892).

20 "*A fortiori* congressional purpose or declaration of policy set out in the preamble of a statute provides a sound and thoroughly acceptable basis for ascertaining the goals of the statute." *Globe Fur Dyeing Corp. v. United States*, 467 F. Supp. 177, 180 (D.D.C. 1978) (citing *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533-34 (1973)); *see also Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971) (relying on stated legislative purpose in preamble of congressional statute to find legitimate secular purpose where statute was challenged on Establishment Clause grounds).

they are included at all.[21] This interpretation is strengthened by Congress' statutory finding that the involvement of religious groups in AFLA programs not only is "appropriate," but also should be "emphasize[d]," § 300z(a)(10)(C), and is among the "best approache[s]," § 300z(a)(8)(B), to addressing the goals of the AFLA.[22] Eliminating the participation of religious groups, as the district court did, directly conflicts with congressional intent and results in a statute very different from the one Congress enacted. The Senate Committee stated that, "[r]ecognizing the limitations of Government in dealing with a problem that has complex moral and social dimensions," it included "promoting the involvement of religious organizations in the solution to these problems . . . . " S. Rep. No. 161, 97th Cong., 1st Sess. 15-16 (1981). This Report also reveals that the Senate Committee decided to include religious organizations even though it realized that an Establishment Clause challenge was a possibility: "[P]rovisions for the involvement of religious organizations do not violate the constitutional separation between church and state." *Id.* at 15.

This Court has also considered subsequent agency action to help determine whether the statute should be severed. *See, e.g., Alaska Airlines*, 94 L. Ed. 2d at 672-73. Similarly, other courts considering whether to sever statutes have examined the manner in which the statutes operated. *See, e.g., Americans United for the Separation of Church & State v. Dunn*, 384 F. Supp. 714, 717, 721-22 (M.D. Tenn. 1974), *vacated for reconsideration in light of statutory amendments*, 421 U.S. 958 (1975); *Public*

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21 Even if participation by religious groups in AFLA programs was not mandatory, Congress clearly intended to encourage strongly such involvement by repeatedly singling out religious groups as particularly desirable participants. Under either interpretation, Congress intended religious groups to play a central and integral role under the Act.

22 It is a fundamental rule of statutory construction that statutory provisions are to be construed, not in isolation, but as a whole in light of both the language of the statute, *U.S. v. Morton*, 467 U.S. 822, 829 (1984), and the purpose and intent of the statute, *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). *See also Lehigh & New England Ry. v. I.C.C.*, 540 F.2d 71, 79 (3d Cir. 1976) ("[W]e have . . . used the preamble as a guide to aid us in determining the legitimate scope of . . . the operative language of [the statute].").

Funds for Public Schools v. Byrne, 444 F. Supp. 1228, 1229-30, 1232 (D.N.J. 1978), *aff'd*, 590 F.2d 514 (3rd Cir.), *aff'd mem.*, 442 U.S. 907 (1979). In both *Dunn* and *Byrne*, the courts examined the manner in which the statute operated and concluded that, if severed, the statute would operate in a fashion dramatically different from what the legislature intended. HHS has interpreted the AFLA as requiring all AFLA grantees to involve religous groups and has denied funding to applicants that have failed to describe adequate religious involvement. *See* Appellees' Br. 7, 8 & nn. 15, 16. Given the undisputed record that the AFLA has been promoting religion for over six years, it is clear that severance would dramatically transform the AFLA.[23]

IV. THE DISTRICT COURT'S ORDER REWRITING THE AFLA IS UNPRECEDENTED

The government seeks to minimize the involvement of religious groups in the AFLA by stating that the Act refers to religious organizations "only" four times. Gov. Reply Br. 15. Yet neither the government nor the intervenor has pointed to a single case in which a statute even mentions *once* the necessity of involving religious organizations in federally funded programs. Nor do they cite any case in which a court has both severed as many as four unconstitutional provisions that appeared throughout a statute and written a new limitation into the statute.

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23 The government argues that section 300z-2(a) "makes no reference to the participation of religious organizations in AFLA programs . . . ." Gov. Reply Br. 16. Yet it is difficult to imagine, and the government does not explain, how a grantee could "strengthen the capacity of families . . . to make use of . . . religious . . . organizations" without either involving religious groups or unconstitutionally promoting religious beliefs.

The government also argues that appellees "erroneously" state that the district court interpreted section 300z-5(a)(21)(B) as mandating the involvement of religious groups by all grantees; the government contends that the court stated that the AFLA simply permits religious involvement. Gov. Reply Br. 7 n.7. The government is mistaken on this point. The court construed this provision as follows: "Section 300z-5(21)(B) of the AFLA . . . further defines what types of institutions the AFLA benefits by *explicitly requiring* applicants to describe how they *will* involve '*religious organizations*' in their programs." J.S. App. 39a-40a (emphasis added).

Most important, in all of the cases cited by appellants where this Court found a statute to be severable, there was a *clear* legislative intent in favor of severability, which is absent here.[24] In addition, in many of those cases,[25] the statute in question contained a severability clause. *See INS v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *Champlin Refining Co. v. Corporation Comm'n*, 286 US. 210 (1932). The existence of a severability clause gives rise to a "presumption of severability." *Chadha*, 462 U.S. at 932.[26] Because it is an explicit statement of legislative intent, a severability clause precludes the need for the court to "embark on that elusive inquiry." *Id.* Thus, these cases are not persuasive authority for severing the AFLA, which does not contain a severability clause and the accompanying presumption as to legislative intent. Although the absence of a severability clause does not ordinarily give rise to the contrary presumption, against severability, the absence in the AFLA of *both* a severability clause *and* assurances of secular use of the funds is indicative of congressional intent and suggests a deliberate choice to

24 In fact in every case in which severability has been found by this Court, there was a clear legislative intent plus at least one of three factors, none of which is present in the AFLA. *See* Cr. J.S. 25-28.

25 The exceptions are *United States v. Jackson*, 390 U.S. 570 (1968) and *Alaska Airlines*, 94 L. Ed. 2d 661. In *Jackson*, this Court severed an unconstitutional death penalty clause from the remainder of the Federal Kidnapping Act. The Court found that "[i]ts elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." 390 U.S. at 586. Upon reviewing the statute and its legislative history, the Court concluded that it was "inconceivable" that Congress would have preferred to have no kidnapping statute if it could not include the unconstitutional death penalty provision. *Id. Alaska Airlines* is discussed *infra* at 15-16. The government also cites the plurality opinion in *Tilton v. Richardson*, 403 U.S. 672 (1971), which is discussed *infra* at 18-19.

26 If "radical dissection" is necessary to preserve the statute, severance is inappropriate despite the presence of a severability clause. *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2181 (1986) (citing *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 445 n.37 (1983)); *Hill v. Wallace*, 259 U.S. 44 (1922); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929).

give a reviewing court no mechanism for removing the religious component of the AFLA.

The only case cited by the district court as support for its severability determination is *Alaska Airlines*, 94 L. Ed. 2d 661. Although the statute in question there did not contain a severability clause, this Court found "abundant indication of a clear congressional intent of severability." *Id.* at 671. Much of that evidence of intent stemmed from the distinctive nature of the severed provision which was a legislative veto provision. As this Court stated, "a legislative veto [provision] . . . by its very nature is separate from the operation of the substantive provisions of a statute." For this reason, the Court found no risk that a court faced with an unconstitutional legislative veto would need to "rewrite" the severed statute to make it capable of functioning independently. *Id.*[27] By contrast, the unconstitutional references to religious organizations in the AFLA occur in four places throughout the Act and are all substantive in that they encouraged direct and extensive religious involvement in AFLA programs.

Furthermore, the statute in *Alaska Airlines* made "a major change and fundamental redirection" in the regulation of air transportation, 94 L. Ed. 2d at 667; *see also Buckley*, 424 U.S. at 7 (this Court severed provision from "by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress") (quoting Court of Appeals). The unconstitutional provision was a minor part of this comprehensive act and subjected only "insignificant" regulations to a veto, as the Court ascertained in part by examining the regulations that were actually proposed. The AFLA, on the other hand, is only a small demonstration project and clearly did not limit religious participation to "insignificant" portions of AFLA programs. Religious organizations were singled out as specifically desired grantees and were encouraged to participate in all phases of all AFLA programs. This Court in *Alaska Airlines* also noted that

27 Nevertheless, a court may not sever an unconstitutional legislative veto provision, even from a statute containing a severability clause, where to do so would be inconsistent with congressional intent. *See, e.g., City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).

a "report and wait" provision that would remain in the severed statute gave Congress an opportunity to oppose or influence new regulations before they went into effect, which "reduced any disruption of congressional oversight caused by severance of the veto provision." Obviously, if this Court rewrites the AFLA to prohibit the participation of religious organizations, that Act, which would be in direct conflict with congressional intent, would be effective immediately with no opportunity for congressional review.[28]

Appellants seek to minimize the significance of the AFLA's repeated references to religion by suggesting that religious organizations are just one of many groups listed in the statute. Int. Reply Br. 6; Gov. Reply Br. 18. But the presence of other groups, like the presence of schools in the statute at issue in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) does "not dilute [the statute's] forbidden religious classification." *Id.* at 120 (quoting Court of Appeals). In *Larkin*, the Court found unconstitutional a Massachusetts statute that vested in the governing bodies of churches *and* schools the power to veto applications for liquor licenses within a five hundred foot radius of the church or school. 459 U.S. at 117. Although the Court found that the statute "embrace[d] valid secular purposes," *id.* at 123, and even offered statutory schemes that might not offend the Establishment Clause, *id.* at 124, the Court found the delegation of power to the churches unconstitutional.[29] The Court declared the entire statute unconstitu-

28 The statute at issue in *Chadha*, 462 U.S. 919, was similar to the statute in *Alaska Airlines*. It also contained an unconstitutional legislative veto provision and contained what was essentially a "report and wait" provision that allowed for some congressional oversight. 462 U.S. at 925. In addition, as noted above, the statute in *Chadha* contained a severability clause. *Id.* at 932.

Although the unconstitutional provision in *Tilton*, 403 U.S. 672, was not a legislative veto, it was analagous to one in that it was a single, isolated provision that was not dependent on the other substantive sections of the statute.

29 The Court in reaching its conclusion noted that the liquor license statute, like the AFLA, contained no assurances to guarantee that religious organizations would act only to further the valued secular goals of the statute:

> The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith.

Larkin, 459 U.S. at 125.

tional and did not suggest that the statute could be severed or otherwise rewritten to permit schools to continue to have veto power over the location of liquor stores.

Other Establishment Clause cases also provide direct support against severing the AFLA. In *Sloan v. Lemon*, 413 U.S. 825 (1973), the Court invalidated under the Establishment Clause a state statute that reimbursed parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. The Court was asked to treat the law as "containing a separable provision for aid to parents of children attending nonpublic schools that are not church related." 413 U.S. at 833. The Court refused this invitation and affirmed the lower court's finding that:

> in view of the fact that so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools. . . . The statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted.

413 U.S. at 833-834; *see also Americans United for the Separation of Church & State v. Dunn*, 384 F. Supp. at 722; *Public Funds for Public Schools v. Byrne*, 444 F. Supp. at 1232. In these cases, there was a risk that religion would be promoted because from 63%, *Dunn*, 384 F. Supp. at 717 n.2, to 95%, *Byrne*, 590 F.2d at 1229, of the schools that would receive benefits were religious. Under the AFLA, religious organizations are to be involved in *one hundred percent* of the programs and the undisputed record demonstrates *actual* advancement of religion, not just a risk. *See* Appellees' Br. 9-17.

In *Meek v. Pittenger*, 421 U.S. 349, 371 n.21 (1975), the Court refused to sever the constitutional provisions of one of the statutes at issue, even though the statute contained a severability clause, finding that it was a "minor" part of the Act and noting that the state would not necessarily have passed the law solely to provide the aid found not to be offensive. *See also Rhode Island Fed'n of Teachers v. Norberg*, 479 F. Supp. 1364, 1373-74 (D.R.I. 1979), *aff'd*, 630 F.2d 855 (1st Cir. 1980).

This Court has refused to sever statutes found violative of the Establishment Clause even where it found that the statute had a secular purpose and was not wholly motivated by religious purposes. Similarly, the pervasive presence of religion in the AFLA renders the "valid secular purpose" of the Act, J.S. App. 22a, irrelevant to the severability analysis.

Tilton v. Richardson, 403 U.S. 672 (1971), one of the only Establishment Clause cases in which the Court chose to sever a statute containing a provision that violated the Establishment Clause, is clearly distinguishable from this case. There the Court held that a federal statute that provided construction grants to universities was constitutional, except for a portion of the statute that limited to twenty years the authority of the government to recover grants that were used for religious purposes.[30] The Court severed the twenty-year limit and wrote:

> We have found nothing in the statute or its objectives intimating that Congress considered the 20-year provision essential to the statutory program as a whole. . . . [T]here is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.

Id. at 684. Although Congress did not consider the unconstitutional provision in *Tilton* to be of great significance, Congress clearly viewed the AFLA provisions concerning religious organizations as necessary and essential to the success of AFLA. Furthermore, the statute in *Tilton* contained *explicit* statutory

30 In striking down this provision, the Court held that the possibility that a grantee would use federally financed buildings for religious purposes twenty years hence could have the effect of advancing religion. 403 U.S. at 683.

restrictions on the use of the federal funds and there had been a track record of careful enforcement under the Act:

> The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship. *These restrictions have been enforced in the Act's actual administration* . . . .

Id. at 679-80 (emphasis added). As the district court found, the AFLA has neither assurances nor an established track record:

> . . . the AFLA contains no restriction whatsoever against the teaching of religion *qua* religion or any attempt to use the education and counseling process to "intentionally or inadvertently" inculcate religious belief. . . . This absence of any statutory prohibition on [sic] inculcation of religious belief puts the AFLA in a class by itself. The Court knows of no other statutory scheme that expressly contemplates religious involvement in a government-funded program and does not attempt to segregate inculcation of religious belief from public financial support.

J.S. App. 29a & n.13. As appellees' main brief and the undisputed facts indicate, the AFLA is unprecedented in its "track record" of promoting religion.

This Court has refused to write in necessary prohibitions that are missing from the face of the statute. In *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973), this Court struck down a New York statute providing for reimbursement for certain testing and recordkeeping costs because the statutory restrictions on sectarian use were inadequate. They left the rewriting to the New York State legislature. In *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980), the Court upheld new legislation that rectified the 1970 New York statute struck down in *Levitt*. Justice White stressed that if the statute in *Regan* had not contained statutory assurances, the outcome would likely have been different:

> Of course, under the relevant cases the *outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services*. But here, as we shall see, the New York law provides ample safeguards against excessive or misdirected reimbursement.

Regan, 444 U.S. at 659 (emphasis added; citations omitted).

CONCLUSION

This Court should reverse the district court's decision to invent a statute different from the one passed by Congress. Obviously, Congress may properly reach the issue of adolescent pregnancy, but it is the method that Congress chose, and which the district court found clearly unconstitutional, that is at issue in this case. Invalidating the AFLA in its entirety will not, as appellants repeatedly insist, Gov. Br. 17-19, Int. Br. 14-17, open the floodgates for invalidation of federal health, housing or poverty programs through which some religious organizations sometimes receive federal funds. Rather, it will make clear that the government may not promote religion or teach religious values to achieve secular goals, whether in the area of sexuality, homelessness or hunger.

For the foregoing reasons, and for the reasons stated in our opening brief, this Court should affirm the district court's order declaring the Adolescent Family Life Act unconstitutional both on its face and as applied, and reverse the district court's order on severability.

Respectfully submitted,

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